

complete corrections of the reported safety violations as alleged in **Paragraph 39** of the Complaint.⁴²⁶ EAI admits that it directed USS to perform sample safety inspections of the WEHCO cable plant in the areas of Searcy and Pine Bluff, Arkansas as alleged in Paragraph 39 of the Complaint.⁴²⁷

224. EAI denies that Comcast and Alliance have attempted to negotiate with EAI in good faith regarding the reasonableness of inspection costs or the engineering specifications required under the NESC and applicable pole attachment agreements as alleged in **Paragraph 40** of the Complaint. EAI also denies the remaining allegations contained in Paragraph 40 of the Complaint. EAI affirmatively states that the inspection costs have been fairly and equitably apportioned between itself and the Complainants. EAI states that the Complainants have not paid any amount to reimburse EAI for their equitable portion of the inspection costs.⁴²⁸

225. From the beginning of the safety inspections, EAI has paid its fair portion of inspection costs to account for any benefit accruing to EAI incidental to the inspection of cable plant. EAI allocated inspection costs among itself and each cable company with attachments in a particular circuit by multiplying total inspection costs for a circuit by a fraction. The numerator of the fraction was equal to the number of contacts a cable company had within a specific circuit. The denominator was equal to the total number of contacts of all cable companies within the circuit, plus the number of safety violations attributed to EAI and telephone companies for this same circuit. By apportioning inspections costs using this formula, EAI allocated to itself and paid a substantial portion of total inspection costs to account for safety violations due to EAI and/or

⁴²⁶ Declaration of Tony Wagoner at ¶ 44.

⁴²⁷ Declaration of Michael Willems at ¶ 16; Declaration of Wayne Harrell at ¶ 24.

⁴²⁸ Declaration of David B. Inman at ¶ 27.

telephone company facilities which were found incidental to an inspection of the cable plant.⁴²⁹

Under this method, EAI has paid inspection costs of \$780,115 and has billed Comcast, Alliance, and WEHCO the amount of \$1,551,950. To date, Comcast, Alliance, and WEHCO have failed and refused to pay any amount for their allocated portion of inspection costs.⁴³⁰

226. Further, the Complainants, through their counsel, have adopted an attitude in negotiations that if EAI does not concede to each and every demand made on behalf of the Complainants then these issues would be brought before the FCC rather than attempt to negotiate a compromise to these issues in good faith. The Complainants' idea of diligently working to resolve their disputes is demonstrated in letters received by EAI. In a letter dated July 16, 2004, sent by Ronnie Colvin, Vice President and General Manager, Comcast, to Hugh McDonald, President, EAI, in response to a demand for payment of the inspection costs allocated and billed to Comcast, Mr. Colvin's sign of good faith was to offer to have one-third of the amount of inspection costs billed to Comcast placed in an escrow account pending ongoing discussions between engineers of EAI and Comcast.⁴³¹ In response to yet another demand that Comcast pay its allocated portion of inspection costs, Mr. Colvin then sent a letter dated August 4, 2004, to Mr. McDonald, suggesting a "global solution" to the issues disputed by Comcast relating to the safety inspections. Comcast's idea of a solution:

- (i) Would have allowed Comcast to self-police its corrections, if they made any corrections at all, by means of post-inspecting its own corrections of violations;

⁴²⁹ Declaration of David B. Inman at ¶ 27.

⁴³⁰ *Id.*

⁴³¹ See Letter from Ronnie Colvin, Vice President and General Manager, Comcast, to Hugh McDonald, President, EAI, dated July 16, 2004, attached as Exhibit "41."

- (ii) EAI would be required to provide Comcast with notice that the inspection had been completed and that corrections had been performed to the satisfaction of EAI solely based upon Comcast's notification to EAI and sign off by Comcast's own contractor that the corrections had been completed without EAI having an opportunity to perform post inspections;
- (iii) Comcast would only pay one-half of the amount of inspection costs appropriately allocated and invoiced through June 7, 2004; and
- (iv) EAI would be prohibited from performing another inspection of the cable plant at the expense of Comcast until 2013.

227. Of course, Comcast's suggested "global solution" did not address the over 12,500 attachments made by Comcast without a permit or authorization of EAI, nor did it address the over 170 attachments made by Comcast to transmission towers owned by EAI in Little Rock, Arkansas in direct breach of Comcast's pole attachment agreement with EAI, and without any rental payment being made by Comcast to EAI for any of the unauthorized attachments.⁴³²

These terms or lack thereof clearly reflect that Comcast was unwilling to negotiate any settlement in good faith.

228. Further pleading, engineering representatives of EAI, Comcast and USS held five meetings beginning May 26, 2004, through July 28, 2004, in an effort to resolve engineering specification issues relating to Comcast's existing plant. For all intents and purposes, EAI

⁴³² See Letter from Ronnie Colvin, Vice President and General Manager, Comcast, to Hugh McDonald, President, Entergy Arkansas, Inc., dated August 4, 2004, attached as Exhibit "42." While the FCC clearly does not have jurisdiction with respect to pole attachments made transmission facilities, *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002), this action on the part of Comcast clearly illustrates their gross disregard for the safety of their workers and EAI's facilities, and is typical of their pattern of behavior.

conceded every specification issue raised by Comcast (with the exception of requirements of anchors and bonding), despite the clear and unequivocal construction standards set forth in the pole attachment agreements governing the parties' relationship and the methods by which attachments are to be made to poles owned by EAI.⁴³³ Although, in July 2004, EAI engineers agreed to all specifications insisted upon by Comcast (with the exception of anchors and bonding), Comcast has *still* failed to take any action to correct its reported safety violations.⁴³⁴ Rather than apply its time and resources to making corrections to safety violations which clearly place non-qualified and untrained employees, contractors and subcontractors of the Complainants and qualified servicemen of EAI in danger of electrocution and other harm,⁴³⁵ the Complainants have chosen the path of concentrating their time and efforts in this matter to begin drafting a Complaint to be filed with the FCC in the event all of the demands of the Complainants were not met. On information and belief, the drafting of the Complaint began soon after the safety inspections were begun.

229. As more fully set forth above, EAI has consistently agreed to allow additional attachments to be made to specific circuits at such time as Comcast or Alliance have made all

⁴³³ Declaration of John Tabor at ¶ 18.

⁴³⁴ Declaration of Wilfred Arnett at Attachment C.

⁴³⁵ See Complaint filed in connection with Brandon Holmes v. Gill, et al. Independence County, Arkansas, Circuit Court Case No. CV2003-45-4, attached as Exhibit "43." Plaintiff, Brandon Holmes, suffered severe electrical burns on July 25, 2002, while working as a subcontractor for Cox. Mr. Holmes, who had not received any training whatsoever with respect to construction and installation of TV cable, was overlashing Cox cable onto a messenger which was placed too close to an energized electric primary line when he came into contact with the electric line and received severe electrical burns.

necessary corrections of reported safety violations within that circuit.⁴³⁶ As pled above, the letter from Webster Darling to John Brinker, Vice-President of Operations, Alliance, dated December 16, 2002, referenced in Footnotes 19 and 20 of the Complaint, states that Alliance must begin to take steps to correct the reported safety violations and make firm arrangements for payment of invoices before EAI would allow further attachments.⁴³⁷

230. Despite the fact that EAI and USS have clearly notified Comcast and Alliance that additional attachments would be allowed once a particular circuit has been cleared of safety violations, Comcast has shown total disregard for the safety of its employees, contractors and subcontractors and the permitting process by surreptitiously placing unauthorized attachments to Circuit V130 as fully set forth above. Circuit V130 had uncorrected reported safety violations at the time these unauthorized attachments were made by Comcast to serve a residential subdivision.⁴³⁸

231. EAI denies the allegations of **Paragraph 41** of the Complaint.

232. EAI admits that WEHCO has performed upgrades or rebuilds of its cable system in Searcy and Pine Bluff, Arkansas, and that EAI continues to allow attachments by WEHCO so long as they are made in compliance with the specifications set out in the pole attachment

⁴³⁶ Declaration of David B. Inman at ¶ 23; See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc., to J. D. Thomas, Counsel for Complainants dated February 17, 2004, Exhibit "44."

⁴³⁷ See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc., to John Brinker, Counsel for Complainants dated December 16, 2002, Exhibit "45."

⁴³⁸ Declaration of John Tabor at ¶ 9; See documents and before and after photographs evidencing these unauthorized attachments made by Comcast attached as Exhibit "40."

agreement and the NESC as alleged in **Paragraph 42** of the Complaint. EAI denies the remaining allegations contained in Paragraph 42 of the Complaint.

233. Insofar as the first sentence contained in **Paragraph 43** of the Complaint makes an allegation, it is denied. EAI is without information sufficient to form a belief as to the allegations contained in the second sentence of Paragraph 43 of the Complaint and, therefore, denies the same. EAI denies the remaining allegations contained in Paragraph 43 of the Complaint. EAI affirmatively states as follows:

(i) On information and belief, in 2001 Cox performed a project to totally replace all cable facilities including, without limitation, strand, hardware, conductors, guy wires, and electronics, and remove all existing cable facilities in Arkadelphia, Arkansas. This project was begun by Cox without prior notification and EAI only learned of any work associated with this project when EAI experienced electric service outages caused by Cox construction during this rebuild project.⁴³⁹

(ii) In Spring, 2002, Cox began a project to totally replace all cable facilities including, without limitation, strand, hardware, conductors, guy wires, and electronics, and remove all existing facilities in Magnolia, Arkansas. EAI hired USS to manage construction and perform post-construction inspections. This project was completed in the Spring 2003.⁴⁴⁰

(iii) In Fall 2002, Cox began a project to totally replace all cable facilities including, without limitation, strand, hardware, conductors, guy wires, anchors, and electronics, and remove all existing facilities in Malvern, Arkansas. EAI hired USS to perform make-ready design

⁴³⁹ Declaration of Wayne Harrell at ¶ 16.

⁴⁴⁰ Declaration of Wayne Harrell at ¶ 17.

engineering and post-construction inspections. USS reported construction work was completed in Spring 2004. Upon post-construction inspection, USS reported 355 violations to Cox as a result of this rebuild. As of this date, 58 locations requiring make-ready work have been designed and delivered to Cox on December 17, 2004. Another 50 violations remain to be corrected by Cox.⁴⁴¹

(iv) In October 2002, Cox began a project to totally replace all cable facilities including, without limitation, strand, hardware, conductors, guy wires, anchors and electronics, and remove all existing facilities in Jonesboro, Arkansas. This rebuild project involves 15,630 poles owned by Craighead Electric Cooperative, EAI and the City of Jonesboro. Cox hired Construction Cable, Inc. ("CCI") to perform make-ready construction for this project. CCI failed to comply with engineering drawings, failed to place guy wires and anchors for attachments, and improperly sagged cable resulting in bowed and broken poles. As a result, Craighead Electric required Cox to stop the project until the faulty construction work performed by CCI on behalf of Cox was corrected before any further attachments could be made or work resumed. As a further result of this shoddy and unsafe construction work, Cox itself hired USS to perform pre-construction inspections, take measurements, perform make-ready design engineering, perform make-ready construction, and conduct post-construction inspections. This project is ongoing at this time.⁴⁴²

(v) In November 2004, Cox began a project to upgrade cable facilities in Russellville, Arkansas. This project is in the initial design stages. Cox hired Utility Consultants, Inc. ("UCI")

⁴⁴¹ Declaration of Wayne Harrell at ¶ 18.

⁴⁴² Declaration of Wilfred Arnett at ¶ 39.

to perform pre-construction inspections, to take measurements and to identify potential make-ready construction work. EAI hired USS to perform make-ready design engineering work.⁴⁴³

(vi) In November 2004, Cox began a project to totally replace all cable facilities including, without limitation, strand, hardware, conductors, guy wires, anchors and electronics, and remove all existing facilities in Gurdon, Arkansas and also to construct fiber optic cable between Arkadelphia, Arkansas and Gurdon, Arkansas. Cox furnished engineering drawings and maps to EAI. EAI hired USS to perform a sample inspection of 100 poles which were identified by Cox as needing make-ready construction. Based in part upon this inspection, EAI performed make-ready design engineering, calculated make-ready costs and performed make-ready construction. EAI also hired USS to conduct post-construction inspections. This project is ongoing.⁴⁴⁴

234. EAI denies the allegations contained in **Paragraph 44** of the Complaint. EAI affirmatively states that EAI did not contract USS to perform comprehensive inspections of all facilities in Arkansas and that each Complainant, as previously stated, was given ample opportunity to participate in every aspect of the inspections but chose not to do so. Further, the vast majority of the cable plant which was inspected has not been in place for many years as alleged in Paragraph 44 of the Complaint.

235. EAI denies the allegations contained in **Paragraph 45** of the Complaint. EAI affirmatively states that its concerns relating to shoddy construction practices of the Complainants and unsafe conditions posed by cable plant were brought to the attention of the

⁴⁴³ Declaration of Bernard Neumier at ¶ 16.

⁴⁴⁴ Declaration of Wayne Harrell at ¶ 19.

Complainants time and time again.⁴⁴⁵ In April 2001, (seven months prior to EAI contracting USS to perform safety inspections of Comcast's cable plant) representatives of EAI and Comcast met to once again attempt to have Comcast repair the poor condition of its plant to no avail.⁴⁴⁶

⁴⁴⁵ Declaration of Jim Lovell at ¶ 5; Declaration of Michael Willems at ¶ 11. *See also*, Comcast, Alliance & WEHCO Trouble Tickets attached as Exhibits "90," "91" and "92," respectively. *See* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated March 24, 1998, attached as Exhibit "46"; *see* Letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated September 10, 1998, attached as Exhibit "47"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated December 1, 1998, attached as Exhibit "48"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated May 11, 1999, attached as Exhibit "49"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated May 13, 1999, attached as Exhibit "50"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated January 10, 2000, attached as Exhibit "51"; *see* letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to Charlotte Dial, WEHCO, dated January 31, 2000, attached as Exhibit "52"; *see* E-Mail from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to John Underhill, WEHCO, dated February 7, 2000 attached as Exhibit "53"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated May 22, 2000, attached as Exhibit "54"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated June 5, 2000, attached as Exhibit "55"; *see* letter from Michael Willems, Area Design Manager, EAI, to J. P. Morbeck, Executive Vice President, WEHCO, dated July 20, 2000, attached as Exhibit "56"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated August 28, 2000, attached as Exhibit "57"; *see* letter from Michael Willems, Area Design Manager, EAI, to John Underhill, WEHCO, dated October 16, 2000, attached as Exhibit "58"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated October 16, 2000, attached as Exhibit "59"; *see* letter from Michael Willems, Area Design Manager, EAI, to J. P. Morbeck, Executive Vice President, WEHCO, dated October 16, 2000, attached as Exhibit "60"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated October 19, 2000, attached as Exhibit "61"; *see* letter from Michael Willems, Area Design Manager, EAI, to Dan Hodges, WEHCO, dated June 25, 2001, attached as Exhibit "62"; *see* Letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to J. P. Morbeck, Executive Vice President, WEHCO, dated July 12, 2001, attached as Exhibit "63"; *see* letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to J. P. Morbeck, Executive Vice President, WEHCO, dated July 18, 2001, attached as Exhibit "64"; *see* letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to Dan Hodges, WEHCO, dated August 27, 2001, attached as Exhibit "65"; *see* letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to J. P. Morbeck, Executive Vice President, WEHCO, dated June 27, 2002, attached as Exhibit "66"; *see* letter from Misty Osborne, Lighting/Joint Use Coordinator, EAI, to Dan Hodges, WEHCO, dated September 10, 2001, attached as Exhibit "69."

236. EAI denies the allegations contained in **Paragraph 46** of the Complaint. EAI affirmatively states that with respect to Comcast, the reason that poles without cable attachments were inspected in the first instance was due to the fact that Comcast was unable and/or refused to provide strand maps to EAI, which Comcast is required under the contract to make available to show the location of its cable attachments in the areas inspected. EAI and USS requested Comcast to provide their strand maps on several occasions, but Comcast refused to do so.⁴⁴⁷ Once again, this evidences Comcast's failure to participate or cooperate in the inspection process as part of Comcast's "catch me if you can" business strategy. Therefore, any additional costs of inspection due to time and expense incurred to determine the location of Comcast's attachments is a direct result of Comcast's failure and refusal to provide its strand maps to EAI and USS and to participate in the inspection process. It is also important to note that Comcast has made 12,592 unauthorized attachments which were found by USS as a result of the safety inspection.⁴⁴⁸

237. With respect to Alliance, maps were provided by Alliance to USS but were deficient and incomplete. After reviewing these maps, EAI and USS determined that the inspections of Greenbrier and Plumerville could be most efficiently conducted utilizing the system maps provided by EAI.⁴⁴⁹

⁴⁴⁶ Declaration of David B. Inman at ¶ 6.

⁴⁴⁷ See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc., to Kyle Birch, Senior Counsel, Comcast, dated Aug. 4, 2003, Exhibit "73;" Declaration of Tony Wagoner at ¶ 9.

⁴⁴⁸ Declaration of David B. Inman at ¶ 11.

⁴⁴⁹ Declaration of Tony Wagoner at ¶ 9.

238. EAI further states that USS did not perform any tasks other than those necessary to determine whether a cable attachment existed on a pole and nothing more for those poles included in the inspection which did not have cable attachments.⁴⁵⁰

239. EAI is without information sufficient to form a belief as to whether poles were inspected which were owned by others with whom the Complainants have independent relationships and separate attachment agreements as alleged in **Paragraph 47** of the Complaint and, therefore, denies the same. EAI affirmatively states that it directed USS to inspect those poles owned by Southwestern Bell Company ("SBC") with EAI and cable attachments solely to determine whether cable plant had been attached in space allocated to and paid for by EAI. EAI also directed USS to measure mid-span clearances of cable, if necessary, between poles owned by EAI and SBC.⁴⁵¹ For all circuits inspected involving Comcast cable plant, there are 53,235 poles of which 46,682 are owned by EAI and 6,553 owned by others, primarily SBC.⁴⁵² For all circuits inspected involving Alliance cable plant, there are 8,517 poles of which 8,466 are owned by EAI and 49 owned by SBC.⁴⁵³ For the one circuit inspected in Pine Bluff, Arkansas involving WEHCO cable plant, there are 399 poles of which 361 are owned by EAI and 38

⁴⁵⁰ Declaration of Tony Wagoner at ¶ 9.

⁴⁵¹ Inspection of mid-span clearances between poles owned by the utility and those not owned by the utility was found reasonable and chargeable to cable by the Federal Communications Commission, *In the Matter of Newport News Cablevision, LTD. Communications, Inc. vs. Virginia Electric and Power Company, d/b/a Virginia Power*, 7 FCC Rcd. 2610, at Paragraph 20, Footnote 43 (1992).

⁴⁵² Declaration of Wilfred Arnett at ¶ 9, Footnote 2.

⁴⁵³ *Id.*

owned by SBC.⁴⁵⁴ For the four circuits inspected in White County, Arkansas involving WEHCO cable plant, there are 571 poles of which 534 are owned by EAI and 37 owned by SBC.⁴⁵⁵

240. EAI denies the allegations contained in **Paragraph 48** of the Complaint. As set forth above, these inspections did not involve every facility and attachment on every pole but rather solely involved inspection of cable plant.⁴⁵⁶

241. EAI denies the allegations contained in **Paragraph 49** of the Complaint.

242. EAI denies the allegations contained in **Paragraph 50** of the Complaint. EAI affirmatively states that total cost to date for the safety inspections is \$2,332,065 of which EAI has allocated and billed the Complainants the amount of \$1,551,950. The remaining balance of \$780,115 has been allocated to and paid by EAI to USS. To date, the Complainants have not paid any amount of the inspection costs allocated and billed to them.⁴⁵⁷

243. EAI denies the first sentence contained in **Paragraph 51** of the Complaint. The remaining statements made in Paragraph 51 are in the nature of a legal argument and are not amenable to either being admitted or denied. To the extent this paragraph contains factual allegations, they are denied. EAI admits that the quote provided is accurate from the case cited. EAI affirmatively states, however, that the inspection which was the subject matter in *Cable Texas, Inc. vs. Entergy Services, Inc.* involved a pole attachment count as opposed to safety inspections performed in this matter and the factual predicate, as explained herein, is entirely

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ Declaration of David B. Inman at ¶ 13.

⁴⁵⁷ Declaration of David B. Inman at ¶ 27.

different. Again, FCC precedent clearly indicates that it is reasonable to (1) allocate costs to the beneficiary of the work; and (2) require attachers with safety violations occasioning a full safety inspection to pay for such inspection.⁴⁵⁸

244. EAI denies the allegations contained in **Paragraph 52** of the Complaint. EAI affirmatively states in 2002, some invoices sent to Comcast billing for inspection costs did not have accompanying documentation due to an oversight. However, beginning in August, 2002, through June, 2003, Comcast was furnished detailed supporting documentation for the invoices in question.⁴⁵⁹ Despite receiving detailed supporting documentation for all invoices, Comcast has failed to pay any amount of its allocated portion of inspection costs totaling \$1,286,773.⁴⁶⁰

245. EAI denies the allegations contained in **Paragraph 53** of the Complaint. EAI affirmatively states that the costs of non-routine safety inspections which are warranted by virtue of the Complainants' widespread and unsafe conditions posed by cable attachments in the service area of EAI are not included in any account in FERC Form 1, and are not recovered in the annual rental or any other fee charged to attachers.⁴⁶¹

⁴⁵⁸ See CTAG, *infra*.

⁴⁵⁹ See letter from David B. Inman, Joint Use Administrator, Entergy Arkansas, Inc. to Ronny Colvin, Vice President and General Manager, Comcast, dated August 30, 2002, attached as Exhibit "24," See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc. to Marc Billingsley, Business Manager, Comcast, dated February 14, 2003, attached as Exhibit "67," See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc. to Kyle Birch, Senior Counsel, Comcast, dated March 11, 2003, attached as Exhibit "68," See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc. to Kyle Birch, Senior Counsel, Comcast, dated June 4, 2003, and accompanying documentation attached as Exhibit "26."

⁴⁶⁰ Declaration of David B. Inman at ¶¶ 30, 36.

⁴⁶¹ Declaration of David B. Inman at ¶ 34.

246. EAI denies the allegations contained in **Paragraph 54** of the Complaint. EAI affirmatively states that when USS has repeatedly asked Comcast or Alliance representatives to specifically point out the missed poles or improper analysis of violations mentioned by these representatives, they have been unable to do so.⁴⁶² For example, Bennett Hooks of Alliance has alleged that USS missed inspecting 100 poles. However, Mr. Hooks has been unable to provide the location of these 100 missed poles when repeatedly requested to do so by USS.⁴⁶³ On information and belief, Alliance created a report entitled "Entergy Audit / No Gig Sheets" which was inaccurate.⁴⁶⁴ When this document was sent by Ms. Romaine McDaniel of Alliance, to John Tabor of USS, Mr. Tabor noticed that there were several poles noted on the document that USS never reported as having violations.⁴⁶⁵ Alliance was given a spreadsheet by John Tabor which listed each pole inspected by USS which on information and belief, Alliance mistakenly believed only listed each pole containing a violation and was then used by Alliance to create their own document.⁴⁶⁶ Regardless, if Mr. Hooks had used the inspection sheets, GPS coordinates, maps, street directions to poles and pictures of poles provided by USS with each violation, Mr. Hooks would have easily identified all poles with violations. He did not do so.⁴⁶⁷

247. During a meeting with Marc Billingsley, Comcast, and James Peacock, UCI, Mr. Billingsley and Mr. Peacock informed John Tabor, USS, and David Kelley, EAI, of a missed violation involving a service drop. Upon a joint ride-out in the field with the same individuals, no

⁴⁶² Declaration of Tony Wagoner at ¶ 29.

⁴⁶³ Declaration of Tony Wagoner at ¶ 29.

⁴⁶⁴ See email message from Romaine McDaniel, Alliance, to John Tabor, USS, dated May 25, 2004, and "Entergy Audit – No Gig Sheets" created by Alliance attached as Exhibit "70."

⁴⁶⁵ Declaration of John Tabor at ¶ 29.

⁴⁶⁶ Declaration of John Tabor at ¶ 29.

⁴⁶⁷ Declaration of John Tabor at ¶ 29; Declaration of Tony Wagoner at ¶ 29; See example of inspection sheet provided by USS to the cable operator Complainants attached as Exhibit "87."

violation was found.⁴⁶⁸ Nor have any of the Complainants notified USS of any specific instances or examples of incorrect inspections performed by USS.⁴⁶⁹

248. EAI denies the allegations contained in **Paragraph 55** of the Complaint. EAI affirmatively states that Section 2.3 – Practices and Specifications of the pole attachment agreements provide as follows:

(A) The Cable Company's use of poles covered by this Agreement shall at all times, *as a minimum*, be in conformity with practices as prescribed by the National Electrical Safety Code ANSI-C2, including all supplements and future revisions and supplements thereto, and where the requirements of public authorities may be in excess of the National Electrical Safety Code the requirements of the public authorities shall be followed. The requirements of the National Electrical Safety Code may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in writing by the Chief Engineer of the Cable Company and the Manager, Distribution Engineering, of the Electric Company.

(B) The Cable Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the specifications of the Electric Company, or any amendments or revisions of said specifications and at the location designated by the Electric Company. Drawings marked 1, 2, 3, and 4 attached hereto and made by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of minimum required construction under some typical conditions, and are intended to serve as a guide and are not intended to cover all situations. These drawings are subject to revision as applicable Electric Company specifications are changed. (emphasis added)

249. Having reaped the benefits under the pole attachment agreements, the Complainants refused to meet their concomitant obligations to erect and maintain cable plant in conformity with the NESC, as a minimum requirement, or the design specifications agreed upon as shown in Drawings 1, 2, 3, and 4 attached and made a part of each pole attachment agreement.

⁴⁶⁸ Declaration of David Kelley at ¶ 13; Declaration of John Tabor at ¶30.

⁴⁶⁹ Declaration of Tony Wagoner at ¶ 51.

250. Even the Institute of Electrical and Electronics Engineers, Inc. recognizes that the NESC sets the minimum requirements to be met to safeguard persons for installation, operation, or maintenance of electric and communication facilities. Section 1 Paragraph 010 of the 2002 edition of the NESC provides that “these rules contain the *basic provisions* that are considered necessary for the safety of employees and the public under the specified conditions. This code is *not intended as a design specification or as an instruction manual.*” (emphasis added)

251. Further, the safety violations found as a result of the inspections are not consistent with decades of practice in the industry in Arkansas as alleged in Paragraph 55 of the Complaint.⁴⁷⁰ EAI requested Comcast’s construction manual and standards to determine how Comcast standards of construction differed from the design specifications shown in Drawings 1, 2, 3, and 4 of the applicable pole attachment agreements.⁴⁷¹ However, EAI was told that Comcast would not furnish any “company documents” to EAI which would evidence Comcast’s own construction standards.⁴⁷²

252. In addition, industry practice with respect to construction methods is provided in Section 3.5 of the Society of Cable Telecommunications Engineers Recommended Practices for Coaxial Cable Construction Testing which states that pole attachments “*must be in accordance with the utility pole-lease agreement.*” (emphasis added)

⁴⁷⁰ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 30.

⁴⁷¹ See letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc. to Kyle Birch, Senior Counsel, Comcast dated June 4, 2003, Exhibit “26.”

⁴⁷² See email from Tony Wagoner, USS, to James Peacock, UCI, dated November 11, 2002; See email from Marc Billingsley, Comcast, to Tony Wagoner, USS, and James Peacock, UCI, dated November 11, 2002; and email from Wilfred Arnett to David Inman, EAI, and Webster Darling, EAI, dated November 12, 2002, attached as Exhibit “71.”

253. Arkansas Code Annotated Sections 11-5-303 and 304 cited by the Complainants in Footnote 38 of the Complaint have no bearing or applicability with respect to design specifications required for cable television attachments, but rather provide for statutory protection for employees who work within 10 feet of any energized overhead electrical line. Arkansas Code Annotated Section 11-5-304 expressly provides that this subchapter does not apply to construction, reconstruction, operation and maintenance of overhead electrical or communication facilities. On the other hand, Arkansas Code Annotated Section 23-17-236, also cited by the Complainants in Footnote 38 of the Complaint, provides that "Construction of telecommunications lines and facilities by a telecommunications company or cooperative *as a minimum requirement* shall comply with the standards of the National Electrical Safety Code in effect at the time of construction or requirements set up by the Arkansas Public Service Commission." This statute further supports the fact that the requirements of the NESC are the bare minimum standards to be met when operating and installing cable facilities in close proximity to hazardous voltage.

254. EAI admits that the provisions of Section 1 Paragraph 013B of the NESC are recognized by the FCC as alleged in **Paragraph 56** of the Complaint. EAI denies the remaining allegations contained in Paragraph 56 of the Complaint. EAI affirmatively states that Section 1 Paragraph 013B of the NESC applies to cable plant. However, none of the Complainants have demonstrated that any particular reported safety violation meets current NESC or falls under the requirements of a previous edition of the NESC. EAI has advised Comcast that EAI would accept a professional engineer licensed in the State of Arkansas and acting on behalf of Comcast to certify on a case-by-case basis that a particular reported safety violation was installed in

conformity with a previous edition of the NESC and is still in compliance with that edition or a subsequent edition of the NESC in order to take advantage of the “grandfathering principals” set forth in Section 1 Paragraph 013B of the NESC.⁴⁷³

255. EAI admits that the provisions of Section 1 Paragraph 013B. of the NESC are followed by EAI with respect to its residential service drops as alleged in **Paragraph 57** of the Complaint. EAI denies the remaining allegations contained in Paragraph 57 of the Complaint. EAI affirmatively states that the vast majority of the safety violations reported to Comcast, Alliance and WEHCO could not comply with *any edition* of the NESC.⁴⁷⁴ EAI further states that EAI applies clearance requirements uniformly.

256. EAI denies the allegations contained in **Paragraph 58** of the Complaint.⁴⁷⁵

257. EAI denies the allegations contained in the first and second sentences of **Paragraph 59** of the Complaint. EAI admits that it has not initiated a “permitting freeze” on telephone companies as alleged in the last sentence of Paragraph 59 of the Complaint and affirmatively states that EAI has not received any permits for new attachments from telephone companies since the safety inspections were initiated. EAI affirmatively states that further cable attachments on a specific circuit have not been allowed until the reported safety violations have been corrected for that particular circuit. EAI further states that this is a reasonable measure taken for reasons of safety, reliability and engineering purposes under Section 224 of the Communications

⁴⁷³ Declaration of David Kelley at ¶ 7.

⁴⁷⁴ Declaration of Wilfred Arnett at ¶ 23; Declaration of John Tabor at ¶ 20; Declaration of David Kelley at ¶ 9.

⁴⁷⁵ See generally, Declaration of Tony Wagoner; Declaration of Wilfred Arnett; Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc.

Act as more fully set forth above. Nonetheless, beginning in December, 2004, EAI has processed permit applications received from Comcast and Alliance as stated above.

258. EAI denies the allegations contained in **Paragraph 60** of the Complaint. EAI has taken affirmative corrective actions and placed jobs in construction to correct violations attributed to EAI and found incidental to the inspection of cable plant. EAI continues to work diligently to correct violations.⁴⁷⁶ EAI has completed corrections for 11,122 violations to date and plans to have all corrections of violations completed by December, 31, 2005.⁴⁷⁷ EAI affirmatively states that EAI expects nothing more and nothing less from the Complainants than what it expects of itself to correct reported safety violations.

259. EAI denies the allegations contained in **Paragraph 61** of the Complaint. EAI affirmatively states that Comcast has corrected 6,797 violations and 40,616 remain to be corrected; Alliance has corrected 1,300 violations and 6,005 remain to be corrected; WEHCO has not corrected any violations and 1,546 remain to be corrected for the circuits inspected; Cox has corrected 223 violations and 108 remain to be corrected with respect to the rebuild project located in Malvern, Arkansas.⁴⁷⁸ The large majority of corrections performed by Comcast and Alliance to date are those requiring the least amount of time and expense.⁴⁷⁹

⁴⁷⁶ Declaration of David Kelley at ¶ 12.

⁴⁷⁷ Declaration of David Kelley at ¶ 12.

⁴⁷⁸ See Declaration of Wilfred Arnett at Attachment C.

⁴⁷⁹ Declaration of Tony Wagoner at ¶ 33; See Comcast, Alliance and WEHCO Violation Progress Reports attached as Exhibit "82," "83" and "84," respectively.

260. Furthermore, corrective actions taken by untrained contractors of Comcast are either faulty, or worse, create additional violations.⁴⁸⁰ Comcast has had a high turnover of contractors on the job. Comcast has had at least five different contractors involved in “correcting” violations at separate times. In most cases these contractors were improperly trained or not trained at all, ill-equipped and not qualified to perform the necessary corrective work.⁴⁸¹

261. EAI admits that some reported safety violations require certain make-ready work to be performed as alleged in **Paragraph 62** of the Complaint. EAI denies the remaining allegations contained in Paragraph 62 of the Complaint. EAI affirmatively states that make-ready work is only required on approximately ten percent (10%) of poles with violations.⁴⁸² EAI has not received any make-ready work requests from either Alliance or WEHCO. Comcast has paid EAI for make-ready work at fourteen (14) locations. Fifty-eight (58) locations requiring make-ready work have been designed and delivered to Cox on December 17, 2004, relating to the rebuild project in Malvern, Arkansas. EAI states that Comcast, Alliance and WEHCO have, at best, a dismal record in the rate of making corrections and that none of these Complainants should be waiting for make-ready work to be completed in order to correct the other ninety percent (90%) of the poles with violations not requiring make-ready work.⁴⁸³

262. EAI denies the allegations contained in **Paragraph 63** of the Complaint. EAI affirmatively states that USS conducts post-inspections once violations are reported to have been corrected by the Complainants. EAI further states that with respect to Comcast, more often than

⁴⁸⁰ Declaration of Wilfred Arnett at ¶ 22.

⁴⁸¹ Declaration of Tony Wagoner at ¶ 12.

⁴⁸² Declaration of John Tabor at ¶ 27.

⁴⁸³ Declaration of John Tabor at ¶ 27.

not, their contractors create additional unsafe conditions when corrections were attempted.⁴⁸⁴

This is due, in part, to the high turnover of Comcast's contractors who are inexperienced, untrained, and ill-equipped to perform the work.⁴⁸⁵

263. EAI denies the allegations contained in **Paragraph 64** of the Complaint.

264. EAI admits that the Commission has jurisdiction to enforce the Pole Attachment Act and the 1996 Telecommunications Act which is designed to facilitate and promote the spread of cable and telecommunications services as implied in **Paragraph 65** of the Complaint. EAI is without information sufficient to form a belief as to the allegations that many cable companies have diligently been working to upgrade their systems to offer advanced communications services as alleged in Paragraph 65 of the Complaint and therefore denies that allegation. EAI affirmatively states, on information and belief, that the Complainants each offer cable modem service, but none offer Voice over Internet Protocol ("VoIP") in the subject service areas.

265. EAI admits that the original build-out construction of attachments owned by the Complainants was performed over 15 years ago, but EAI denies that the vast majority of the cable television attachments have been in place for that length of time as alleged in **Paragraph 66** of the Complaint. EAI denies the remaining allegations contained in Paragraph 66 of the Complaint. EAI affirmatively states that each Complainant has performed significant (both in scope and number) upgrades, new build-out construction, and rebuilt cable plant without notice

⁴⁸⁴ Declaration of Tony Wagoner at ¶ 12.

⁴⁸⁵ Declaration of Tony Wagoner at ¶ 12.

*extensive damages to cable plant owned by the Complainants across the State of Arkansas which was and remains in a state of disrepair and is rife with unsafe conditions.*⁴⁹¹

273. In addition, it is beyond dispute that the Complainants' failure to properly install guy wires and anchors and proceeding to overlash cable without analyses of added weights and stresses under heavy load conditions exposed EAI's pole plant to damages during the ice storm and other severe weather conditions.⁴⁹² EAI further pleads that the Complainants had ample opportunity to participate in the safety inspection process from the very beginning and chose not to do so.⁴⁹³

274. EAI admits that USS took necessary measurements, photographs and GPS coordinates as part of its safety inspection of cable plant as alleged in **Paragraph 73** of the Complaint. EAI denies the remaining allegations contained in Paragraph 73 of the Complaint. EAI affirmatively states that poles inspected with only EAI facilities were not measured but only recorded.⁴⁹⁴

275. EAI objects to the term "Targeted Communities" where used throughout the Complaint. Subject to this objection, EAI admits that USS has performed safety inspections in the cities of Little Rock, Plumerville, Greenbrier, Searcy, and Pine Bluff, Arkansas as alleged in **Paragraph 74** of the Complaint. EAI denies the remaining allegations contained in Paragraph 74 of the Complaint. EAI affirmatively states that the inspections performed in the cities of Magnolia,

⁴⁹¹ Declaration of Gary Bettis at ¶ 13; Declaration of Michael Willems at ¶ 12; Declaration of Bernard Neumeier at ¶ 15; See Comcast, Alliance and WEHCO Trouble Tickets attached as Exhibits "90", "91" and "92", respectively.

⁴⁹² *Id.*

⁴⁹³ See response to Paragraph 17 of the Complaint above; Declaration of David B. Inman at ¶¶ 8, 18.

⁴⁹⁴ Declaration of Tony Wagoner at ¶ 9.

Malvern, Gurdon, and Russellville were in connection with the rebuild projects undertaken by Cox. These inspections were pre-and post-construction inspections performed in response to permit applications submitted by Cox where the majority of safety issues were corrected prior to construction.⁴⁹⁵

276. EAI admits that the Complainants are subject to separate but substantially identical pole attachment agreements which control the attachment of Complainants' facilities to EAI poles and within the vicinity of its lines as alleged in **Paragraph 75** of the Complaint.⁴⁹⁶ EAI denies the remaining allegations contained in Paragraph 75 of the Complaint. EAI affirmatively states that the pole attachment agreements provide, in pertinent part, that:

Article II

Placing, Transferring or Rearranging Attachments

Section 2.2 – Maintenance and Rearranging

(A) The Cable Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so attachments will not conflict with the use of said poles by the Electric Company, or by other companies using said poles or interfere with the working use of facilities thereon or which may from time to time be placed hereon.

* * * * *

Section 2.3 – Practices and Specifications

(A) The Cable Company's use of poles covered by this Agreement shall at all times, **as a minimum**, be in conformity with practices as prescribed by the National Electrical Safety Code ANSI-C2, including all supplements and future revisions and supplements thereto, and where the requirements of public authorities may be in excess of the National Electrical Safety Code the requirements of the public authorities shall be followed. The requirements of the National Electrical Safety Code may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in writing by the Chief Engineer of the Cable Company and the Manager, Distribution Engineering, of the Electric Company.

⁴⁹⁵ Declaration of Tony Wagoner at ¶ 52.

⁴⁹⁶ See Pole Attachment Agreements attached as Exhibits "2A- 2D" of the Complaint.

(B) The Cable Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the specifications of the Electric Company, or any amendments or revisions of said specifications and at the location designated by the Electric Company. Drawings marked 1, 2, 3, and 4 attached hereto and made by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of **minimum required construction** under some typical conditions, and are intended to serve as a guide and are not intended to cover all situations. These drawings are subject to revision as applicable Electric Company specifications are changed. (emphasis added)

* * * * *

Section 2.6 – Maintenance of Poles and Attachments

(D) The Cable Company shall at all times maintain all of its attachments in accordance with the practices mentioned in Article II and shall keep them in safe condition and in thorough repair.

277. EAI denies the allegations contained in **Paragraph 76** of the Complaint. EAI affirmatively states that the pole attachment agreements require the Complainants' cables, wires and appliances to be erected and *maintained* in accordance with the specifications of EAI and that Drawings 1, 2, 3 and 4 attached to the agreements describe the minimum required construction under typical conditions as specified by EAI which, in very few instances, may differ from the minimum requirements set forth in the NESC. For instance, a pole attachment agreement executed on March 3, 1980, between EAI and Riverside Cable TV, Inc. (predecessor of Comcast) requires the same design standards as those contained in the pole attachment agreements attached to the Complaint.⁴⁹⁷ In most instances, on the other hand, the design standards which the Complainants and their expert claim exceed the standards of the NESC, are, in fact, the basic provisions of the NESC.

⁴⁹⁷ See Pole Attachment Agreements between Riverside Cable TV, Inc. and Arkansas Power & Light Co. attached as Exhibit "72."

278. What the Complainants are, in effect, claiming is that their facilities should somehow fall within an exception to the basic provisions provided under the NESC. This places untrained cable workers in a position of making sophisticated electrical engineering decisions at the pole which they are clearly not qualified to make. Further, all of the design specifications are incorporated in the pole attachment agreements specifically with the safety of workers and the general public and reliability of the electrical distribution system in mind. EAI further states that cable companies have always been required to erect and maintain cable facilities in accordance with EAI's design specifications and EAI has enforced these specifications through the permitting process.⁴⁹⁸

279. However, in many cases the cable companies did not submit applications for permits and simply attached without prior authorization from EAI. This is the case for Comcast.⁴⁹⁹

280. EAI admits that Section 2.7 of the pole attachment agreements require the Complainants to install a bonding wire on every pole where a vertical ground wire exists as alleged in **Paragraph 77** of the Complaint. EAI denies the remaining allegations contained in Paragraph 77 of the Complaint. EAI affirmatively states that requiring the Complainants to bond on poles where a vertical ground wire exists in excess of 4 grounds per mile is a reasonable standard for reasons of safety and reliability.⁵⁰⁰ In addition, Section 6.9 of the Recommended Practices for

⁴⁹⁸ Declaration of Gary Bettis at ¶ 8; Declaration of Michael Willems at ¶ 8; Declaration of Bernard Neumeier at ¶ 8; Declaration of Wayne Harrell at ¶ 7.

⁴⁹⁹ Declaration of David B. Inman at ¶ 40; Declaration of Brad Welch at ¶¶ 17-18.

⁵⁰⁰ Declaration of John B. Dagenhart, Chair of Subcommittee to Grounding Methods to the Institute of Electrical and Electronics Engineers at ¶¶ 14-15; Declaration of Lonnie Buie, , Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶56 ("Even if a one mile segment complies, the next pole in the segment immediately adjacent may not comply. Also ground wires which run vertically on the pole to the ground are frequently severed and stolen for